Supreme Court, U.S.
FILED

No. 99-489

IN THE
SUPREME COURT OF THE UNITED STATES

DENISE HERNDON,
Petitioner,

vs.

SUNSERVICE, a Division of Sun Microsystems, Inc.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S OPPOSITION TO PETITION

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QUESTION PRESENTED

Whether the Ninth Circuit's "specific and substantial" evidence standard to demonstrate pretext under Rule 56 is in conflict with any other circuit court or with any relevant decision of this Court.

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This case involves Federal Rule of Civil Procedure 56(e) which provides in relevant part:

> **(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts

> showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

STATEMENT OF THE CASE

1. Introduction

In this disparate treatment claim of race discrimination, Petitioner Denise Herndon ("Plaintiff" or "Herndon") was unsuccessful in her attempts to rebut her employer's legitimate business reasons for its actions, and the Ninth Circuit properly affirmed summary judgment in favor of Respondent SunService (hereinafter "Defendant" or "Sun"). In her Petition, Herndon questions whether the Ninth Circuit's "specific and substantial" evidence standard to demonstrate pretext is consistent with FRCP 56. This Court should agree with the court of appeals that there was simply insufficient evidence to create a genuine triable issue. Further, the "specific and substantial" evidence standard applied by the Ninth Circuit is not in conflict with the other circuits nor does it conflict with the relevant decisions of this Court. Plaintiff has had her full day in several courts and the matter does not raise an important federal question deserving review by this Court.

SunService's business is to support and educate Sun Microsystem's customers regarding its products. SunService's Worldwide Marketing Department, where Herndon worked, is responsible for developing the SunService image for quality service and support. Plaintiff was a Marketing Services Coordinator (grade level E4) performing, for the most part,

work related to the updating of information contained in Sun's databases of products, parts and services.

2. Herndon's early employment and 1991 demotion.

The court of appeals ruled that Herndon could not rely on events that occurred prior to June 3, 1993 as such claims were time barred. Petitioner does not challenge this determination in her Petition. These early facts are presented only as background.

On June 9, 1986 Sun hired Herndon as a Response Coordinator II. Over the years, she received satisfactory or better performance ratings, and several promotions. On April 23, 1990, Herndon was selected by manager Eileen Marshall for a promotion to Marketing Analyst/Scheduler, a level E6 position.

After five years of admittedly nondiscriminatory employment, Herndon alleged that despite her outstanding performance, she was demoted in 1991. However, Herndon's work in the marketing analyst job was not outstanding. Herndon's supervisor, Marshall, explained that Herndon was not able to perform the job despite having twice reduced Herndon's workload and giving Plaintiff additional training. Marshall reduced Herndon from a grade level E6 to E4. However, Herndon's pay and benefits remained the same.

3. Marino transfers into Herndon's unit.

On about April 1, 1992, Rickert became Herndon's supervisor. In summer or early fall 1993, Rickert told her manager, Jay Friedman, that she needed someone to relieve her

workload by assuming certain of her duties. In response, Friedman mentioned to Rickert that an employee from another department, Cathleen Morgan-Marino ("Marino"), was available for reassignment. Marino was in the process of being laid off. Consistent with Sun's practice, the Company assisted Marino in finding another position within Sun.

Rickert interviewed Marino, and concluded she had the necessary skills. Before arranging Marino's transfer, Rickert consulted Human Resources ("HR") representative Norma Olmos about whether an "opening" should be posted on Sun's job posting system so other interested employees could apply. HR concluded posting was not required because there was in fact no job opening in Rickert's unit. Rather, this was a reorganization and transfer of needed skills, not the creation of a job opening as to require a posting. (Indeed, the group had no budget for this additional employee, and after Marino's transfer, her former unit continued to pay her salary until Rickert's group could obtain funding.) Also, HR reasoned if the job were posted and another individual selected, Marino would be laid off thereby defeating the purpose of finding her another job.

On September 6, 1993, Marino transferred into the group. She assumed several of Rickert's duties (including conducting meetings and out-of-country training, writing processes and procedures, and coordinating work with external vendors). Herndon admitted most of the tasks Marino assumed were previously Rickert's. Rickert concluded that Herndon could not have competently performed these duties. She was not a good writer, nor did she have experience in writing processes and procedures. In addition, Plaintiff lacked the presentation, public speaking, and training skills needed to perform the functions. Herndon admitted she does not know

whether Rickert discriminated in failing to give her Marino's job.

4. **Herndon's position was reviewed to ensure that it was at the correct level.**

Hewson further admitted that, in 1993, Rickert approached her and initiated an effort to have Herndon's position re-leveled to a higher grade. On November 2, 1993, Rickert submitted Herndon's job description to Sun's Compensation unit for re-evaluation.

At Sun, all jobs are assigned a grade level (e.g., E4). For each grade level, the Company assigns a salary range which is used to determine the employee's salary. Sun's Compensation unit assigns the appropriate grade level to each job company wide to ensure equal pay for equal work. Unlike a promotion, the issue is not whether an individual is worthy of a higher grade. Rather, the sole issue is whether the position (and not the individual incumbent) is assigned the correct level. Accordingly, in re-evaluating an existing job, Sun determines whether the functions of the job are the same or similar to other jobs at the same level. The individual qualifications of the incumbent in the job are irrelevant in performing such a compensation analysis.

Accordingly, Compensation Manager John Hytinnen reviewed the description of Herndon's job. On January 10, 1994, he concluded the job could not possibly warrant a higher grade than E4. Hytinnen saw no evidence the job required the application of principles, theories or concepts in order to warrant a higher level. He further concluded, compared to other level E4 jobs, Herndon's job was probably set too high.

Significantly, in reaching his conclusion, Hytinnen did not know Herndon much less her race. Herndon admitted she never met Hytinnen, never spoke to him, nor communicated with him by E-mail. She also admitted she has no idea whether Hytinnen discriminated against her.

5. **Herndon filed a charge of discrimination with the EEOC.**

On April 29, 1994, Herndon filed a charge of discrimination with the EEOC alleging that on January 22, 1994, Sun discriminated and retaliated by not re-leveling her job to a higher grade.

6. **Herndon did not perform higher-level duties warranting a promotion.**

On May 2, 1994, Rickert left and Tom Berghoff, the second-level manager, became the temporary, acting supervisor of Herndon's group. Herndon urged Berghoff to re-level her job upwards. She did not tell Berghoff that the Compensation unit had already evaluated her job. After finding out the position had just been reviewed, Berghoff told Herndon he would not explore this issue for at least a year. (Sun's practice is to conduct at most one re-leveling evaluation of a position per year.)

Herndon alleges from April 1994 to January 1995, she performed supervisory duties in Berghoff's absence. She also alleges she performed Marino's job duties for approximately 5 months during Marino's disability leave of absence. Sun asserts Herndon performed the duties of a non-supervisory lead. Because Berghoff's substantial travel obligations, he was not present to supervise on a day-to-day basis. He asked

Herndon, as the more senior, to take a lead role over Herndon's co-worker, Christina Atilano. Herndon distributed work assignments to Atilano, but she exercised no independent judgment of consequence. Also, while Marino was on leave, Herndon performed some but not many of Marino's functions. The bulk of Marino's duties were performed by her supervisor and a consultant Sandra Mende.

7. **Herndon was unqualified for a project coordinator job.**

In October 1994, Terry Bond allegedly invited Herndon to apply for an opening for E5 project coordinator. Herndon asserts Bond failed to interview her. Bond subsequently told her management wanted someone with experience working in Sun's education department, experience Herndon did not have. Herndon believes an individual named Frank was selected but she knows nothing about his qualifications.

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On November 1, 1994, Herndon filed a complaint of discrimination with the federal Office of Federal Contract Compliance Programs. She alleged that Sun discriminated against her on account of race in failing to promote her.

8. **Herndon was assigned new duties as part of a department reorganization.**

On January 23, 1995, Sun hired Valerie Hirsch to supervise Plaintiff's group. Hirsch reported to Berghoff (now the second-level manager). She and Berghoff met to reorganize the group to improve productivity. For this effort, Hirsch asked

Herndon to describe her job tasks. This led to a protracted effort to obtain this information from Herndon.

Following their review of department functions, Berghoff and Hirsch decided to reorganize everyone's job duties (Hirsch, Herndon, Atilano and Marino). Herndon alleges the changes to her job were made in retaliation for her complaint of discrimination filed with the OFCCP. However, the decision to reorganize was made before the managers knew of Herndon's complaint. Berghoff and Hirsch completed and presented Herndon with her new job description on March 13, 1995. Sun was notified that Herndon had filed a complaint with the OFCCP on April 3, 1995. Sun first informed Berghoff and Hirsch of Herndon's complaint a month later, on April 13, 1995. Herndon admitted she kept the filing quiet because she did not want people to know. She did not tell Hirsch, Berghoff or any other manager about the filing.

Further, the changes to Herndon's job were not onerous, and everyone's job was changed. Hirsch took over Herndon's duty as liaison with the Information Resources department regarding the "bug" list (a list of software bugs). Herndon's data entry functions were reassigned to Atilano. At the same time, one of Marino's tasks, editing the Passport (SGS) database, was assigned to Herndon. Marino was reassigned to manage the Spectrum Pac project in the Worldwide Marketing Department, reporting directly to Berghoff.

Immediately, Herndon complained to HR saying this reassignment (without a promotion) was unfair because Marino, an E6, had previously performed the Passport editing function. On March 21, 1995, HR Manager Marian Davis explained to Herndon that the Passport function was appropriate for her E4 level, and the addition of this one task to

her duties did not warrant a grade change. Davis concluded the meeting by asking Herndon what she wanted HR to do for her. Herndon responded she did not want HR to do anything; she simply wanted to make her feelings known.

However, Herndon resisted carrying out her new duties. This led to another protracted effort by managers to convince Herndon to perform the duties. Finally, Berghoff wrote Herndon urging her to carry out her new responsibilities. Because they had discussed the matter a number of times, he considered the issue closed. In late May 1995, Herndon began working on the Passport database.

9. **Berghoff cooperated with the OFCCP investigation.**

Herndon argued that in retaliation for filing her complaint with the OFCCP and as part of his continuing discrimination against her, Berghoff tried to "get dirt on her." Rather, in about June 1995, OFCCP Compliance Officer Peggy Martinez investigated Herndon's complaint. As part of her investigation, she interviewed Berghoff about Herndon's performance deficiencies. During the interview, Berghoff mentioned he had received several complaints from employees about Herndon. Martinez requested Berghoff identify these individuals. Berghoff responded that these complaints were made in confidence and he needed to get the complainants' permission before disclosing their identity to the OFCCP. Martinez asked that Berghoff obtain their permission and written statements from these individuals. Accordingly, Berghoff contacted the employees and asked for their cooperation. Several agreed and provided written confirmation they had complained about Herndon's conduct.

10. **Herndon was unqualified for a marketing support job.**

On July 14, 1995, Herndon applied for an E6 Marketing Support Specialist position opening for which Berghoff was the hiring manager. Berghoff gave her an interview. Herndon asserted Berghoff, during the interview, added requirements that were not on the job posting. The addition of these requirements purportedly precluded her from qualifying. However the job posting, created before Berghoff had any inkling that Herndon would apply, stated the need for "strong written communication skills, project management and reporting experience." Herndon did not have these minimum qualifications. Berghoff subsequently selected Kellie Bishop for the job because she was the most qualified. Herndon admitted she does not know Bishop's qualifications.

11. **Herndon received an unsatisfactory performance rating.**

On about August 14, 1995, Herndon filed her lawsuit. She provided the Company with a copy of the lawsuit complaint on about September 19, 1995. Herndon asserts that she received a lower performance evaluation rating in retaliation for filing her lawsuit.

In August 1995, Berghoff and Hirsch prepared Herndon's annual performance evaluation. HR Manager Davis reviewed the document, conferred with Berghoff and Hirsch regarding its contents, and concurred with their assessment. In September 1995, Berghoff and Hirsch presented Herndon with her evaluation, rating her performance at an "M" level, meaning that: "Your performance fully meets some of the requirements of your position. However, a key area(s) of your job requires

improvement." Management pointed out several areas for improvement. Regarding Herndon's decision-making abilities they wrote: "Although Denise spends many hours researching problems, the time could be better spent in other ways. . . . Oftentimes, she fails to consult the technical manuals that clearly document how certain procedures are performed. . . ." Concerning Herndon's creativity, they wrote: "Denise often performs duties for years on end without questioning whether they are still valid. . . . A more appropriate approach would be to consistently look for opportunities to streamline and simplify rote tasks rather than to continue performing them endlessly without understand[ing] their need or importance."

12. **Herndon received a PIP and departed on a disability leave of absence.**

In November 1995, Berghoff and Hirsch consulted with HR Manager Davis in order to discuss Herndon's continued unsatisfactory performance and whether placing Herndon on PIP status was warranted. Davis reviewed the matter and advised that a PIP was appropriate. Accordingly, in December 1995, Berghoff and Hirsch placed Herndon on the PIP. The managers wrote that Herndon's job performance had not improved. Regarding her work on templates (i.e., forms) to be used in revising the Passport database, they wrote that her work was "rife with inaccuracies, misspellings, typographical errors and omissions." Accordingly, Herndon was placed on PIP status until February 1, 1996. Soon after receiving the PIP, Herndon left on a disability leave of absence and did not return.

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Properly Concluded that Herndon Did Not Establish Pretext.

In a well-reasoned decision, the court of appeals thoughtfully addressed each of Herndon's claims and correctly ruled that she failed to raise a triable issue of fact that Sun's proferred legitimate business reasons were a pretext for discrimination.

A. Herndon did not establish pretext with respect to the denial of the E6 Marketing Support Specialist Position.

With respect to the E6 Marketing Specialist opening, Sun rebutted Herndon's prima facie showing by showing that she did not possess the strong written communication skills, and project managing or reporting experience required for the position. Herndon argued that the requirement of writing skills had been added after the job posting in order to justify rejecting her application. The court correctly observed, however, that the original job posting expressly stated that the position required "strong written communication skills." Plaintiff further merely asserted that she was qualified but did not offer any other evidence of her purported qualification.

Herndon argued that the court failed to give weight to prior performance evaluations that praised her communication skills. The court concluded that these evaluations did not establish that Herndon possessed the requisite "'strong writing skills, [and] project management or reporting experience' that Sun reasonably believed Herndon did not possess." (Petition, Exhibit A, page 5a.)

B. Herndon failed to rebut Sun's legitimate nondiscriminatory reasons for Marino's transfer.

Concerning Marino's transfer into Herndon's unit as an E6, Sun showed that Herndon was not considered because her supervisor, Rickert, believed Herndon could not perform the required duties. Herndon argued that this was pretext because she purportedly performed Marino's job while Marino was on disability leave. The court rejected this argument because the evidence showed that Herndon was merely assigned duties appropriate for her E4 level, and did not show that she ever "conducted meetings and out-of-country training, wrote processes and procedures, and coordinated work with external vendors" that were Marino's responsibilities. Further, the court rejected Herndon's submission of other employees' statements that Herndon was supposedly qualified to perform Marino's job functions because they were "generalized and conclusory statements." Further, these statements were inconclusive whether "any of the declarants knew the extent of Marino's job functions and whether Herndon had the ability to perform each of them." (Id.)

C. Herndon did not establish pretext concerning her releveling request.

Regarding Herndon's request to have her E4 position releveled to a higher grade, Sun established that the administrator who denied the request, John Hytinnen, did not know Herndon's race at the time of his evaluation, and accordingly, could not have intentionally discriminated against her based on race. Herndon did not dispute this fact but argued that Hytinnen's review was subjective and flawed. The court concluded, however, that whether the determinations are

subjective is immaterial in the absence of evidence that the "process was wrongfully manipulated in her specific case."

D. Herndon failed to rebut Sun's legitimate nondiscriminatory reason for denying her application for project coordinator position.

Concerning Sun's denial of Herndon's application for an E5 project coordinator job in another department, Sun showed that Herndon was rejected because the manager, Terry Bond, preferred to promote someone with experience from within the department. The court ruled that Herndon offered no evidence demonstrating that Sun's proffered reason was merely a pretext.

E. Sun properly reconfigured Herndon's job duties as part of a department reorganization.

Concerning Sun's decision to reconfigure Herndon's job duties, Defendant showed that it reorganized the department and assigned Herndon functions appropriate for her E4 classification. Sun also showed that the decision makers could not have intended to retaliate against Herndon because at the time of the reconfiguration they did not know that Herndon had filed discrimination claims. The court ruled that Herndon offered nothing to rebut Sun's showing and, accordingly, did not raise a triable issue of fact.

F. Herndon did not establish pretext with respect to her negative performance evaluation

Sun established that subsequently, Herndon received a negative performance evaluation because of consistent errors in her work. The court rejected the claim of discrimination because she failed to offer evidence to rebut Sun's proferred reason.

Regarding retaliation, Herndon asserted that her manager Berghoff talked to co-workers about her complaint, allegedly "looking for dirt" on Plaintiff to defeat her claims of discrimination. Berghoff denied making the "dirt" comment but admitted that he was tasked by the federal OFCCP investigator to contact Herndon's peers in order to document whether they had complaints about Plaintiff's work performance. He therefore requested several employees to furnish such statements. The court concluded Herndon failed to demonstrate retaliation because she did not offer evidence to rebut Sun's proffered reasons for the negative evaluation. (Id. at p. 7a.)

G. Herndon's other "evidence" of discrimination did not establish a triable issue of pretext.

Lastly, Herndon urged that the court should credit evidence of disparate treatment by other minority employees. This included statements by minority employees that they had not been promoted during the time that non-minority employees were promoted. Herndon also relied on a statement, purportedly made by Sun's CEO, that he resented the government telling him who he can and cannot hire, a report

that allegedly found disparity in the number of blacks employed in high executive positions at Sun, and a survey of women employees at Sun that supposedly concluded minority employees "have it worse."

The court rejected such evidence because Herndon did not establish that she was qualified for any of the positions cited, whether she or other minorities ever applied for the promotions, or even the identity of the decision makers. Such evidence did not involve any of the individuals who purportedly discriminated against Herndon.

Further, the court concluded that such evidence did not establish a hostile work environment under this Court's standard enunciated in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 126 L.Ed.2d 295 (1993) (The workplace must be "permeated with discriminatory intimidation, ridicule, and insult ... that is sufficiently severe or pervasive to alter the conditions of [her] employment and create an abusive working environment."[1]

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[1] Similarly, the court ruled that Herndon failed to establish a disparate impact case. She failed to allege the existence of a facially neutral policy that in fact impacted more harshly on a protected group and that could not be justified by business necessity. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 123 L.Ed.2d 338 (1993).

2. The Ninth Circuit's "Specific and Substantial" Evidence Standard To Establish Pretext Is Not in Conflict With Any Other Circuit and Is Consistent With This Court's Relevant Decisions.

Petitioner contends in her papers that the Ninth Circuit's application of the "specific and substantial" evidence standard to demonstrate pretext in the context of summary judgment in an employment case presents a "significant question of federal law." Yet, no argument presented by her to this Court demonstrates why this so-called significant question is worthy of the extraordinary relief she requests in the form of a writ of certiorari. Of the various criteria applied to determine whether a question merits review by this Court, only two bear any possible relevance to the instant petition: (1) a conflict by a U.S. Court of Appeal decision and that of another U.S. Court of Appeal on the same matter, [S.Ct. Rule 10(a)]; or (2) a decision by a U.S. Court of Appeal on a question of federal law that has not been, but should be resolved by this Court, [S.Ct. Rule 10(c)].[2] Nor should a petition issue where the error asserted by Petitioner consists of "erroneous factual findings" or the "misapplication of a properly stated rule of law." As discussed more fully below, Petitioner has not asserted any legal basis upon which the issuance of a writ would be appropriate in this case. Her petition should therefore be denied.

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[2] Petitioner contends that this Court has never addressed the applicable standard for establishing pretext in the context of summary judgment in an employment case. Consequently, she cannot seek issuance of a writ under Rule 10(c) on the grounds that the Ninth Circuit's ruling "conflicts with relevant decisions of this Court." S.Ct. Rule 10(c).

A. This Court Set The Standard Applied By The Ninth Circuit on Summary Judgment.

Petitioner's attempt to characterize the Ninth Circuit as a maverick in its development of the "specific and substantial evidence" standard lacks any basis in law and fact. In addressing the standard for summary judgment under Rule 56(e), this Court held in 1968 that a plaintiff opposing a summary judgment motion bore the burden to produce specific and significantly probative evidence of a factual dispute. First Nat'l Bank v. Cities Service Co., 391 U.S. 253, 288-90, 20 L.Ed.2d 569 (1968). In other words, Rule 56(e) requires that "sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 289. Consequently, the plaintiff needs more than just some evidence, as Petitioner would contend, but evidence that has a specific bearing on the material fact at issue, i.e., which shows a "genuine issue for trial."

Borrowing directly from this holding, the Ninth Circuit applied this test in a sex discrimination action to require the plaintiff in opposition to a motion for summary judgment to advance specific facts rising to the level of "significantly probative" evidence, i.e., the type which would demonstrate a genuine issue for trial. Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979) (citing First Nat'l Bank, supra). Understandably, the application of this specific and significantly probative evidence standard requires that the evidence have significant probative force to counter the defendant's evidence of no discrimination. Over time, the Ninth Circuit has made a change in nomenclature to use

"significant probative force" interchangeably with "substantial evidence" without any change in the requirement that the evidence adduce sufficient evidencing force to counter the defendant's legitimate, nondiscriminatory basis for its actions. See Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998) (applying "substantial evidence" test and citing case law requiring that evidence in opposition to summary judgment be "sufficiently probative."); see also Nidds v. Schindler Elevator Corp., 113 F.3d 912, 918-19 (9th Cir. 1997) (using the nomenclature "sufficiently probative" to require that the evidence be significant to rebut employer's proffered reasons). Such evidence may be either direct or circumstantial so long as it is "sufficiently probative" or "substantial." Godwin, 150 F.3d at 1222.

Indeed, Petitioner's application to this Court is further disingenuous in that it refers to a schism within the Ninth Circuit as to what standard should be applied but cites approvingly to two cases which apply the exact standard she now attacks. Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994) (requiring "specific, substantial evidence of pretext.");[3] Washington v. Garrett, 10 F.3d 1421, 1433 (9th Cir.

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[3] Plaintiff's citation to Wallis for the proposition that summary judgment against an employee is only appropriate where there is no evidence at all to rebut the employer's legitimate explanation misstates the law. The holding of the Wallis case resulted from the plaintiff's actual lack of any evidence whatsoever to support his case in response to the employer's legitimate nondiscriminatory reasons. Wallis, 26 F.3d at 892. The plaintiff's failure in that case to adduce any evidence to rebut the defendant's legitimate explanation does not automatically result in the wholesale obviation of the requirement that a plaintiff produce specific evidence of

1993). These cases, she contends, impose a "sensibly [sic] burden" to produce evidence in opposition to a motion for summary judgment. Petition, at 19. Yet, that requirement is no different than it has ever been in this Circuit, i.e., to produce specific evidence which is sufficiently probative to establish pretext. Cf. Ruffin, 607 F.2d at 1280; Washington, 10 F.3d at 1434 (evidence of conflicting rationales for adverse action sufficient to establish pretext).

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sufficiently probative value to rebut a defendant's legitimate rationale for its actions.

B. The Ninth Circuit's Specific and Substantial Evidence Standard Does Not Conflict With The Standards Applied By Other Circuit Courts.

Petitioner's ability to support her petition to this Court based on Supreme Court Rule 10(a) fails in that no conflict exists between the summary judgment standards for pretext in the Ninth Circuit and its counterparts, in the employment context.[4] As discussed above, the Ninth Circuit employs a "specific and substantial evidence" test such that the evidence, whether circumstantial or direct, must be significantly or sufficiently probative of a material fact at issue. In the First Circuit, "[t]o prevail over a properly supported motion for summary judgment, a nonmoving party must establish the existence of a trialworthy issue by presenting 'enough competent evidence to enable a finding favorable to the nonmoving party.'" Dykes v. DePuy, Inc., 140 F.3d 31, 36 (1st Cir. 1998). Thus, summary judgment is not precluded by any factual quibble, but rather "substantial" evidence. Dykes, 140 F.3d at 36; see also Udo v. Tomes, 54 F.3d 9, 12 (1st Cir. 1995) (requiring "sufficient evidence" to demonstrate pretext). The Fifth Circuit employs a similar test requiring that the plaintiff produce a conflict in "substantial evidence to create a jury question." LaPierre v. Benson Nissan, Inc., 86 F.3d 444, 449 (5th Cir. 1996).

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[4] Respondent did not locate any case law applicable to this issue in the D.C. and Federal Circuits.

The remaining circuits each apply standards approximating those in the Ninth, First, and Fifth Circuits. See Grady v. Affiliated Central, Inc., 130 F.3d 553, 560 (2d Cir. 1997) (applying sufficient evidence standard); Iadimarco v. Runyon, 1999 U.S. App. Lexis 22029 (3d Cir. 1999) (evidence must be such that reasonable mind could find material issue of fact); Burns v. AAF-McQuay, Inc., 96 F.3d 728, 732 (4th Cir. 1996) (evidence of "sufficient probative force" required to overcome summary judgment); Woythal v. Tex-Tenn Corp., 112 F.3d 243, 246 (6th Cir. 1997) (sufficient evidence from which jury could conclude that employer's explanation should be rejected); Carter v. St. Louis Univ., 167 F.3d 398, 401 (8th Cir. 1999) (sufficient evidence standard); Tomsic v. State Farm Mut. Auto Ins. Co., 85 F.3d 1472, 1478 (10th Cir. 1996) (sufficient evidence standard); Mayfield v. Patterson Pump Co., 101 F.3d 1371, 1376 (11th Cir. 1996) (significantly probative standard).

Regardless of the semantics employed, the common denominator of these standards remains that the plaintiff needs more than just some evidence to prevail against a summary judgment motion. She must in fact raise sufficiently probative or significantly probative evidence to raise a genuine issue of material fact. The "substantial evidence" standard employed by the First, Fifth, and Ninth Circuits is no different. See LaPierre, 86 F.3d at 449 ("evidence is 'substantial' if it is 'such as to allow a rational factfinder to make a reasonable inference'" of pretext). Rule 10(a) does not support any basis for granting this petition for writ of certiorari.

C. This Circuit's Specific And Substantial Evidence Standard For Pretext Aligns With This Court's Construction of FRCP 56(e) And Does Not Present Any Issue For Further Resolution.

As discussed above, the Ninth Circuit's specific and substantial evidence test is derived in part directly from the Supreme Court's interpretation of FRCP 56(e). First Nat'l Bank, 391 U.S. at 289. It is therefore directly aligned with the standards articulated by this Court with respect to the sufficiency of the evidence which a plaintiff must adduce to successfully defeat a summary judgment motion. None of this Court's subsequent rulings regarding the plaintiff's burden to establish a triable issue of material fact alters this standard.[5] See e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 91 L.Ed.2d 202 (1986) (describing sufficiency of the evidence in "run of the mill" civil cases). The Ninth Circuit's ruling at issue in this case does not conflict with any prior ruling of this Court and Petitioner has failed to identify any specific or important question of law which requires this Court's further attention. See S. Ct. Rule 10(c).

* * *

Distilled to its essence, Petitioner's case does not present any legal issue worthy of the extraordinary relief she seeks from this Court. Rather, her petition for writ of certiorari seeks a second attack on the District Court's review of the

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[5] To the extent that Petitioner's claims that the courts should apply a "special" evidentiary approach toward discrimination cases, she fails to articulate any justifiable basis for this position.

insufficient evidence she presented in opposition to Respondent's motion for summary judgment. A petitioner's desire to dispute the lack of specific and substantive evidence to support her claims does not warrant the issuance of a writ of certiorari. S. Ct. Rule 10.

CONCLUSION

For the reasons stated, Respondent respectfully submits that the writ prayed for by Petitioner be denied.

Respectfully submitted,

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November 24, 1999